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IN THE

# Supreme Court of the United States

1964

No. [redacted] 1412

STATE OF FLORIDA, ex rel., NORBERT FOX, individually, and as next friend and legal custodian of DEBORAH ANN FOX and DENISE MARIE FOX, his two minor children,

Petitioner,

v.

FLORENCE J. WEBSTER, formerly known as FLORENCE J. FOX,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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# INDEX


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 3 |
| Questions Presented | 3 |
| Constitutional Provisions Involved | 3 |
| Statement of the Case | 4-16 |
| The Parties | 4 |
| Background of Controversy | 4 |
| Proceedings Below in the Case at Bar | 15 |
| Reason for Granting the Writ | 17-23 |
| Important and Unsettled Question, Concerning the Extent to Which State Courts Must Grant Full Faith and Credit to Valid Custodial Decrees of Sister States Absent Changed Conditions Affecting the Welfare of the Child under Article IV, Section 1 of the United States Constitution Should Be Settled by Pronouncement of This Court | 17 |
| Conclusion | 23-24 |
| Appendix | |
| Opinion and Judgment of District Court of Appeal of Florida, Third District, dated March 12, 1963 | App. 1 |

## INDEX (cont.)


Page

Order of the Supreme Court of Florida, Case No. 32769, allowing certiorari, dated 28 October 1963 ..... App. 7

Order of the Supreme Court of Florida, Case No. 32769, discharging Writ of Certiorari, dated 22 January 1964 ..... App. 8

Petitioner's Exhibit 2:

Order of the Court of Common Pleas of the County of Cuyahoga of Ohio, Case No. 702, 725, awarding custody of the children to Petitioner ..... App. 10

Petitioner's Exhibit 4:

Certification of the Report of the Department of Domestic Relations ..... App. 13

Report to the Court ..... App. 16

Reports to other Courts and Social Agencies ..... App. 26

Summary and Investigator's Conclusions ..... App. 28

Department of Domestic Relations' Notice of Recommendation dated 9-21-60 ..... App. 29

Journal Entry to be Recommended ..... App. 30

Reporter's Transcript, Page 34, "In the Matter of the Application of Norbert Fox for Writ of Habeas Corpus," dated March 6, 1961 ..... App. 32

## INDEX (cont.)


Page

Petitioner's Exhibit 5:

Order denying supersedeas of the District Court of Appeal of California, Second Appellate District, Division 3, Second Civil No. 25374 ..... App. 34

Order denying writ of supersedeas of the District Court of Appeal of Florida, Second Appellate District, Division 3, Second Civil No. 25374, as it appears in the California Appellate Reporter ..... App. 36

## TABLE OF CASES


| | Page |
|---|---|
| Bastian v. Bastian, 160 NE 2d 133 (Ohio 1959); 73 ALR 2d 1440 | 20 |
| Ford v. Ford, 371 US 187, 9 L Ed 2d 240, 83 S Ct 273 (1962) | 17 |
| New York, ex rel. Halvey v. Halvey, 330 US 610, 91 L Ed 133 (1946) | 17, 18 |
| State ex rel. Fox v. Webster (Fla. App. 1963) 151 So. 2d 14 | 1, 16, 20, 21 |


## CONSTITUTIONAL AND STATUTORY PROVISIONS


| | Page |
|---|---|
| Article IV, Section 1 of the Constitution of the United States | 3, 17, 22, 23, 24 |
| 28 U.S.C. Section 1257 (3) | 3 |
| Chapter 65, 141, Florida Statutes 1963 | 19 |
| Deering's Penal Code of California, Section 278. Chap. IV, Child Stealing | 18 |
| Page's Ohio Revised Code Annotated, Title 29, Sec. 2901.33, Child Stealing (GC Sec. 12425) | 18 |
| Revised Code of Ohio, Sections 3109.02, 3190.94 | 19 |

IN THE

# Supreme Court of the United States

No. .....

STATE OF FLORIDA, ex rel., NORBERT FOX, individually, and as next friend and legal custodian of DEBORAH ANN FOX and DENISE MARIE FOX, his two minor children,

Petitioner,

v.

FLORENCE J. WEBSTER, formerly known as FLORENCE J. FOX,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Norbert Fox, a citizen of Ohio, respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, entered on 12 March 1963, affirming the Final Order of 8 May 1962 of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, discharging a

writ of habeas corpus wherein Petitioner sought to enforce Ohio and California decrees awarding custody of his two minor daughters to him. The Circuit Court granted custody of the children to Respondent. (**State ex rel. Fox v. Webster,** (Fla. App. 1963) 151 So. 2d 14.)

## OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, dated 12 March 1963, is reported at 151 So. 2d 14 and is reprinted in the Appendix to this Petition (App. 1-6). Rehearing was denied 2 April 1963.

The order of the Supreme Court of Florida dated 28 October 1963 allowing certiorari is reprinted in the Appendix to this Petition (App. 7).

The order of the Supreme Court of Florida, dated 22 January 1964, dismissing the writ of certiorari is reprinted in the Appendix to this Petition (App. 8-9). Rehearing denied 2 March 1964.

The order of the Ohio Court of Common Pleas, County of Cuyahoga County, Case No. 706,725, dated 8 October 1960, is reprinted in the Appendix to this Petition (App. 10-12).

The order of the Superior Court of California, County of Los Angeles, Department No. 95, In The Matter of the Application of Norbert Fox for Writ of Habeas Corpus, HC 75853, dated 6 March 1961, is reprinted in the Appendix hereto (App. 32-33).

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

## QUESTIONS PRESENTED

**(1) In the absence of changed circumstances, is it repugnant to Article IV, Section 1 of the United States Constitution for a Florida Court to deny full faith and credit to an Ohio decree awarding custody of minor children to their father?**

**(2) Where a California Court adjudicates an Ohio custody order to be valid, in the absence of changed circumstances, is it repugnant to Article IV, Section 1 of the United States Constitution to deny full faith and credit to a California decree adjudicating the same Ohio decree to be valid?**

## CONSTITUTIONAL PROVISION INVOLVED

Article IV, Section 1 of the Constitution of the United States provides:

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

## STATEMENT OF THE CASE

### The Parties

Norbert Fox filed a Petition for Writ of Habeas Corpus against his ex-wife, Florence J. Webster, formerly known as Florence J. Fox, seeking the custody of his two minor daughters, Deborah Ann Fox and Denise Marie Fox (R 19-24). In his Petition, the husband relied upon two decrees of sister states; an Order of the Ohio Court of Common Pleas, dated 8 October 1960, granting him custody of the children (R 20-22, App. 10-12) and a subsequent Order of the California Court adjudicating the validity of the Ohio decree (R 22, App. 32-33).

### Background of Controversy

The parties were married at Cleveland, Ohio, on 27 June 1953. Deborah Ann, now 9 years of age, and Denise Marie, now 8 years of age, are issue of said marriage (R 19).

The wife met her present husband, Richard Webster, in Cleveland while he was on leave from the Service (R 92). Webster was employed by Trans World Airways prior to being in the Service and resumed his employment thereafter (R 92). In August of 1958 Webster was transferred by TWA from Cleveland to Los Angeles, California (R 93).

In October of 1958 (R 224), the husband returned from work to find a note from the wife stating, "We have left for California for a two week vacation." (R 93-94, 224). The wife remained in California for three months

(R 94, 225), during which time the husband supported her and the children (R 94, 225), and thereafter returned to Ohio.

Four months later, in May of 1959, the wife, leaving another note on the kitchen table, again departed for California with the children (R 225). She remained in California approximately a year. During this year the husband continued to support the wife and his children (R 225).

On 17 November 1959, the wife gave birth to a third child in Torrence, California, while still married to husband (R 88-90). The wife concealed the birth of her son from husband and his birth certificate shows that Webster is the father (R 89). Without the knowledge or permission of her then husband, Respondent-wife gave her son up for adoption, but later regained custody of said child (R 91).

At the hearing the wife testified that she did not know whether husband Fox or Webster was the father of said child, but admits that in a previous California hearing she had testified that husband Fox "was not the father of the child." (R 122). "In order to save trouble" the wife placed said child for adoption (R 91). Webster testified that at the time of the adoption he was not sure that he was the actual father of the child and admits having written a letter to the wife during this period of time concerning a third man, Jim Whitely, with whom the wife traveled across the continent (R 187) and planned to spend a night in New York at his cousin's (R 187). The wife first testified that Webster was not jealous of Whitely (R 186) but then testified that he was (R 187). She

denied that they were romantically involved (R 187) but admits that she had in her personal possession his picture suitable for framing (R 187).

In the Spring of 1960 the parties executed a separation agreement which was later incorporated in the Final Decree and which, **inter alia**, provided: (R 20-22

> "4(a) The wife shall have the sole and exclusive custody and control of the children of said marriage subject to the following restriction. The wife shall maintain a residence for said children within Cuyahoga County or the Counties contiguous to Cuyahoga County so that the husband shall be able to have the right to have private visits with the children at least once each week if he will notify the wife in advance and obtain her consent to the time of the visit. Such visits shall not interfere with the schooling, sleep and general welfare of the children. It is agreed between the husband and the wife that the wife may not change the resident environs of the children as set forth above without obtaining the prior approval of the husband or the court.
>
> "(b) The husband shall pay the wife for the support and care of said children the sum of $120.00 per month.
>
> ****
>
> "(d) The parties hereto mutually agree that the children shall be educated in Catholic Elementary Parochial schools and the husband shall pay

> whatever additional amount is necessary for this education. The children shall have a Catholic High School education, if they elect to go to a Catholic High School, and the husband shall pay the additional cost of such education."

and which was entered by the Court on 18 May 1960 (PX 1).[1] At the time of the divorce, the wife knew that she was going to marry Webster (R 94) who was working in California but claimed he was to be transferred back to Ohio (R 95).

Divorced on 18 May 1960 (PX 1), the wife and Webster were married on 1 June 1960 (R 96). The wife admits that at the time of the divorce husband Fox did not know about the third child having been born in California. Webster was not transferred to Ohio and on 20 July 1960, the wife filed a Motion to Permit her to Remove the two children to California (R, PX 2). The hearing on her Motion was scheduled for 5 August 1960 (R 96, PX 1 A for iden.) On 23 July 1960, the husband filed his Motion for an Order Changing Custody and control from the wife to the husband (PX 2, App. 10-12), alleging that at the time the wife entered into a separation agreement, she promised to keep the children in the Ohio jurisdiction; she well knew that her husband to be was assigned to the Los Angeles area and that "she wilfully entered into the agreement knowing full well that when the divorce was obtained she had no intention to keep that part of the agreement which she knew was most vital" to husband Fox and further alleged that it was in the best interests of the children that their custody be awarded to him.

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[1] Florence J. Fox vs Norbert Fox, Case No. 706,725, in the Court of Common Pleas, Cuyahoga County, State of Ohio.

The hearing scheduled on wife's Motion for Permission for Removal was scheduled in Ohio on 5 August 1960 (R 96). On 4 August 1960, contrary to the recommendation of her Ohio attorney, she removed the children to California (R 102). In the instant hearing the wife denied that she knowingly defied the order of the Ohio Court (R 97, 99), but admits that in a subsequent hearing in California, she testified to the contrary.[2] (R 98).

The wife took the two girls to California so that she would not have to worry about them (R 102). Immediately upon deplaning, she and Webster went to a California attorney and filed an action in California against the husband in Ohio for child support (R 102).[3]

In Los Angeles the wife worked in a bar and restaurant and she and her husband worked on opposite shifts so that they would not have to pay a babysitter for the three minor children (R 104). Although seeking child support (R 103), the wife disclaimed the need for money, and worked because she enjoyed it (R 104).

Meanwhile, back in Ohio, the husband's Petition for Change of Custody had been personally served upon the wife before she left Ohio (R 172). The wife admits signing the United States postal receipt for the report of the Department of Domestic Relations on 26 September 1960 (PX 4, App. 10, R 174). The report, which is self-explanatory, reflects that the Ohio Department of Domestic Relations conducted an extensive investigation concern-

---

[2]"Q. You knew when you took the children from Cleveland to Los Angeles you violated the order of Court?
A. If that is the way it is put, I guess."

[3]Los Angeles Superior Court No. 21504.

ing the fitness of the father and sought to obtain information concerning the mother, but was unsuccessful in procuring such information (PX 4, App. 17, 27).[4] Said report further shows that the recommendation of the Department of Domestic Relations would be submitted to the Ohio judge for signature (PX 4). On 8 October 1960, the Ohio Court entered the following Order (PX 2 App. 10-12):

---

[4] "COUNTY OF CUYAHOGA
Cleveland, Ohio

The Court of Common Pleas
Department of Domestic Relations
Room 50, Court House

E. Dana Brooks,
Director

April 23, 1963

Re: 706,725 Fox

TO WHOM IT MAY CONCERN:

This is to certify that the attached photostatic copy of the report of the Department of Domestic Relations upon the motion to change custody and control of the minor children, Deborah Ann and Dennis Marie Fox, filed July 28, 1960, is a true and correct copy of the Department of Domestic Relations relating to such motion. Further the records of this Court show that a notice of the recommendation was delivered by certified mail to the plaintiff, Florence J. Fox, also known as Mrs. R. L. Webster, the same being certified under No. 808380, on September 21, 1960, and a return receipt signed "Mrs. R. L. Webster", on September 26, 1960, bearing certified No. 808380, is a part of the Department's file in the above action.

The recommendation of the Department of Domestic Relations was reduced to a journal entry and signed by the presiding judge, and appears of record in Journal Volume 352, page 590.

Yours very truly,

/S/ E. Dana Brooks

E. Dana Brooks".

EDB/jp
Enc.

IN THE COURT OF COMMON PLEAS
NO. 706,725

"STATE OF OHIO )
COUNTY OF CUYAHOGA ) SS

Florence J. Fox, )
Plaintiff, ) JOURNAL
vs. ) ENTRY
Norbert Fox, )
Defendant. )

October 8, 1960

This matter coming on to be heard upon the motion of the Plaintiff to move children from Cuyahoga County, and motion of Defendant to modify custody the Court being fully advised in the premises, and having received the report and recommendation of the Department of Domestic Relations finds that service was had according to law and that a notice of the recommendation was delivered to both parties or their counsel on September 21, 1960 and that no motion for an oral hearing before the Court has been filed pursuant to Rule 23 (d) of the rules of this Court, and that therefore the parties are found to have waived their right to any further hearing thereon:

The Court further finds that by order of this Court heretofore rendered, the custody of the minor children of the parties was awarded to the Plaintiff and that the Defendant was ordered to pay the sum of $120.00 per month for the support of the minor children.

The Court further finds that the Plaintiff has re-

moved the children from the State of Ohio contrary to the provisions of the separation agreement and decree.

The Court further finds that by reason of the changed conditions and circumstances since the date of the previous order, the same should be modified.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motion of the plaintiff for permission to remove the children from the County of Cuyahoga be and is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff shall return the minor children to the County of Cuyahoga and the State of Ohio on or before October 4, 1960, and in the event she fails or refuses to return the said children to the jurisdiction of the Court, the custody of the minor children, Deborah Ann, born October 21, 1954, and Denise Marie, born June 21, 1956, be and is hereby granted to the defendant who is ordered to return the children to the jurisdiction of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event the plaintiff fails or refuses to return the minor children to the jurisdiction of this Court or fails or refuses to turn the said children over to the defendant at his request upon the operation of this order transferring custody of said children to the defendant the orders heretofore made for the support of said children shall be and are hereby terminated until further order of the Court.

/S Charles W. White
Judge"

divorce journal 352, page 590

The wife failed to obey the Order of the Ohio Court. On 28 February 1961, husband filed a Petition for Writ of Habeas Corpus in the Superior Court of the State of California in and for the County of Los Angeles in an effort to retain custody of the minor children (PX 4 App. 32-33). The Writ of Habeas Corpus was issued and was assigned to Honorable Allen Miller, Judge of said Court, in Department No. 95, under Case No. HC 75853; that testimony was heard before said Judge on 6 March 1961 at a time when both parties were represented by counsel (App. 32-33). At the conclusion of the hearing (App. 32-33, p. 34) Judge Allen, **inter alia**, stated:

> "However, the situation involved in this case is a matter primarily of jurisdiction. We have a valid order of the Court of Common Pleas of Ohio, which is a good order, in my mind, a valid order, and this is primarily jurisdictional, and they did have jurisdiction over the parties at the time it made that order, and by reason of comity, and otherwise, I am going to grant this writ of habeas corpus.
>
> I am going to stay execution thereof for three days and I am going to make an order, specific order, that the children are not to be removed from their present residence or out of the county of Los Angeles pending the three day stay of execution."

Thereafter the wife, Florence J. Webster, filed a Petition for Supersedeas in the District Court of Appeal of the State of California, which Petition was denied (PX 5, App. 34-36).

Notwithstanding the ruling of the Ohio Court and the ruling of the California Courts that custody of the minor children should be with the father, in complete disregard of the Order of the California court, for the second time, the wife, Florence J. Webster, in the face of a second valid Court Order, took the law into her own hands and fled the jurisdiction of the California Court, as she had previously done with the Ohio Court (R 112).

After the California Court ordered the wife to surrender the custody of the two children to the husband, aware of the ramifications (R 108-114), the wife and Webster abandoned California, drove to Florida, and then flew to San Juan, Puerto Rico (R 112).

The wife admitted that at least one check was returned for insufficiency of funds (R 113); that she and her husband sought to conceal their whereabouts (R 114) and that they were later informed that the police were looking for them; and that in violation of law, they drove from Los Angeles to Florida in a truck and camper which they did not own, abandoned it at the Miami Airport, and informed their brother-in-law, who had "the credit people take care of it." (R 206-207).

Deborah Ann was uprooted from school in California and did not attend school during the four months she was in Puerto Rico (R 115). They returned to Miami on 18 July 1961 (R 56), where wife had her fourth child. (R 115). Contrary to her agreement to educate the children in a parochial school, the wife placed Deborah Ann in a public school in Dade County (R 209-211), where she was required to re-enter the first grade, although she was accelerated to the second grade subsequently.

Webster, who received a tenth grade education (R 280), has a take-home pay of $90.00 a week (R 270). The Websters rent a two-bedroom house in Hialeah, sharing their bedroom with her son, and the three girls share the other bedroom (R 159).

The wife testified that the husband's earnings are sufficient to meet the needs of the family (R 201), but at the conclusion of the hearing, her attorney revealed their financial distress (R 334-335).

Fox, 32 years of age, has not remarried, and as a civil service fireman earns $6,000.00 a year (R 216). He owns a two-story house in Cleveland containing "two big bedrooms, bathroom, dining room, living room, kitchen, full basement and recreation room, and part of the upstairs is finished off for living quarters." (R 217). He has a high school education and took a night course at college (R 220). Fox works "24 hours on and 48 off, which amounts to between nine and ten days a month." His parents, "in perfect health," would watch over the children when he was at work. (R 218). When he first saw Deborah Ann in Florida, she ran up, hugged and kissed him (R 220), but since the proceedings she hides and refuses to give him a kiss (R 222). Fox recognizes that children are entitled to a mother's love, and if he were given custody of his children, he would make it a point to encourage them to spend time with their mother (R 223). At the time of the divorce, Fox did not know that his wife had a third child (R 224).

At the conclusion of the hearing the Judge, discharging the Writ, stated, **inter alia:** (R 332)

> In hearing the evidence this court finds that both parents, I believe, are well able to care for these children, but the Court finds that the welfare of the children would be best served to be with the mother, even though I am satisfied from the evidence I have heard that you have not always been an exemplary person, but I feel at the present time you are rearing your children properly and that she should have custody of the children."

**Proceedings Below in the Case at Bar**

On 12 April 1962, Norbert Fox, as Petitioner, filed a Petition against his former wife for a Writ of Habeas Corpus seeking custody of his two minor children (R 19-24). Petitioner relied upon an Order of the Ohio Court of Common Pleas dated 8 October 1960 granting him custody of the children (App. 10-12) and a subsequent Order of the California court (App. 32-33). Petitioner also offered evidence that the Respondent-mother was unfit (R 11). On 8 May 1962, the lower court discharged the Writ of Habeas Corpus and granted custody of the children to the Respondent-mother, although noting that it did not find the petitioning father to be an unfit parent (R 332).

In the trial court, Petitioner raised and affirmatively presented a Federal question involving full faith and credit of the decrees of two sister states, Ohio and California. On appeal to the District Court of Appeal, Petitioner raised, affirmatively presented and argued to the District Court of Appeal the same Federal question as to

full faith and credit. (**State ex rel. Fox v. Webster**, 151 So. 2d 14 (Fla. App. 1963). (App. 1-6).

On 12 March 1963 (Rehearing denied 2 April 1963), the District Court of Appeal affirmed the Order Discharging the Writ of Habeas Corpus and decided the Federal question of full faith and credit or comity adversely to the Petitioner. (State ex rel. Fox v. Webster, supra, App. 1-6).

On 29 May 1963, Petitioner filed his Petition for Writ of Certiorari to review the Order of the District Court of Appeal affirming the Order of the Circuit Court in and for Dade County, Florida. In his Petition for Certiorari, Petitioner affirmatively presented to this court the above stated Federal questions. The decision of the said Federal question was necessary to the determination of this cause by this court, and the judgment rendered by this Court could not have been rendered without deciding it. (R 1-13).

On 28 October 1963, the court entered an Order Allowing Certiorari and set down oral argument on jurisdiction and merits (R 337, App. 7). After said oral argument on 22 January 1964, the Petition for Writ of Certiorari was denied (R 338, App. 8).

On 6 February 1964, Petitioner filed his Petition for Rehearing. On 2 March 1964 said Petition was denied (R 341).

## REASON FOR GRANTING THE WRIT

**Important and Unsettled Question Concerning the Extent to which a State Court Must Grant Full Faith and Credit to a Valid Custodial Decree of a Sister State Absent Changed Conditions Affecting the Welfare of the Children under Article IV, Section 1, of the Constitution Should Be Settled by Pronouncement of this Court.**

The courts of California and Florida, confronted with an identical order, identical parties and identical issues, rendered clashing adjudications. With one of every four marriages terminating in divorce, the public interest demands that this Court settle the problem arising from run-away custody cases. In **Ford v. Ford**,[1] as in **New York ex rel. Halvey v. Halvey**,[2] this Court expressly declined to consider the extent to which the court of the forum must give full faith and credit to a valid custody order of a sister state. The case **sub judice** presents a dramatic example of why this Court should no longer avoid[3] a clear pronouncement of the weight to be given foreign custody decrees under the full faith and credit clause of the United States Constitution where there is no question of jurisdiction or changed circumstances. In the instant proceedings, unlike many custody cases, there is no issue of jurisdiction over the parties and their children. In every court in this coast-to-coast litigation, the parties and the children were physically present. Moreover, in Ohio, whose

[1] 371 US 187, 9 L Ed 2d 240, 83 S Ct 273 (1962).

[2] 330 US 610, 91 L Ed 133 (1947).

[3] In Ford, supra note 1, this Court said, 371 US 187, 192, 9 L Ed 2d 244: "Whether the South Carolina court's interpretation of the Full Faith and Credit Clause is a correct one is a question we have previously reserved. We need not reach that question here."

decree the husband seeks to enforce, it was the mother who invoked the jurisdiction of Ohio and then fled. This self-imposed judicial "quarantine" has become an incubator for continuing litigation over custody and abduction of children. Nor was such turmoil unforeseen by Mr. Justice Rutledge in his concurring opinion in **New York ex rel. Halvey v. Halvey.**[4]

Armed with Ohio and California custody decrees, Norbert Fox, confident that there had been no change in circumstances in his ability to provide a good home for his children, had the naivete to resort to a court of a sister state to obtain the actual custody that twice had been judicially given to him. Mr. Fox did not avail himself of the criminal laws of Ohio[5] or California[6] to settle a private controversy. It is absurd but true that Mr. Fox would

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[4] 330 US 609, 619, 91 L Ed 1133, 1138: "The result seems unfortunate in that, apparently, it may make possible a continuing round of litigation over custody, perhaps also of abduction, between alienated parents. That consequence hardly can be thought conducive to the child's welfare."

[5] *Page's Ohio Revised Code Annotated*, Title 29, § 2901.33. Child stealing. (GC § 12425).

No person shall lead, take, carry, decoy, or entice away a child under the age of twelve years, with intent unlawfully to detain or conceal such child from its parent, guardian, or other person having the lawful charge or custody thereof, or knowingly harbor or conceal a child so led, taken, carried, decoyed, or enticed away.

Whoever violates this section shall be imprisoned not less than five nor more than thirty years.

[6] *Deering's Penal Code of California*, § 278, Chap. IV. Child-stealing. [Definition and punishment].

Every person who maliciously, forcibly, or fraudulently takes or entices away any minor child with intent to detain and conceal such child from its parent, guardian, or other person having the lawful charge of such child, is punishable by imprisonment in the state prison not exceeding twenty years.

now subject himself to criminal prosecution[7] were he to take his children back to Ohio contrary to the orders of the Florida court, notwithstanding that no Florida court had ruled the Ohio or California decrees invalid nor found changed circumstances.

Today, with 2-hour airline service between Miami and New York, 7 hours between Miami and San Francisco, must a father who has been awarded custody of his minor children by two courts of competent jurisdiction be compelled to litigate in every forum until the mother finally discovers some court that will **expressly** ignore the validity or invalidity[8] of a decree of a sister state and rule that even though the father is fit and proper and the conduct of the mother has not always been "exemplary",[9] as long as she is not an out-and-out prostitute, dope addict, or the like, a mother's love supersedes all else for the best interests of the children. Parenthetically, it is to be noted that in Ohio by statute[10] the mother and

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[7]*Florida Statutes 1963*, Chap. 65, Divorce, Alimony and Custody of Children.

65.141. Felony to remove children from state contrary to court order.—

(1) It is unlawful for any person, in violation of a court order, to lead, take, entice or remove a child beyond the limits of this state with personal knowledge of the order.

[8]In dismissing the writ of habeas corpus, the Florida court stated: (R 333) Let the record reflect that I am not ruling on the validity or invalidity of the decree that was entered by the Ohio court changing custody or modifying the decree changing custody to the father, but suggest taking the transcript of this record back to the State of Ohio and petition the courts there for a modification wherein you would be granted the right to have the children for a period of one month during the summer vacation, leaving the permanent custody in the mother.

[9]Supra, p. 15.

In the opinion *sub judice*, on this subject the appellate court stated: "Nor do we condone the actions of the appellee (the mother, Florence J. Webster.)"

[10]§§ 3109.03, 3109.04, *Revised Code of Ohio*.

father stand on equal footing when it comes to deciding the custody of a minor child.

Unlike the South Carolina Court in **Ford v. Ford,**[11] which made a studious effort to adjudicate the custody decree in the light of Virginia law, the Florida Courts concerned themselves not at all with what the law might be in Ohio. The Ohio law is the same as that of practically every other state; the controlling factor is the welfare of the child, but once a Court has determined custody, there can be no modification in the absence of changed circumstances. In **Bastian v. Bastian,**[12] the Ohio Court ruled:

> "The pole star in all custody matters between parents is, what is for the best interests of the child whose custody it is sought to change, subject, however, to the rule that where a court has once decreed that a home with one of the parents is fit and proper, no subsequent change of custody should be made, unless there has intervened such changed conditions affecting the welfare of the child that a change of custody is required to promote the best interests of that child.
>
> See: Sec 3109.04, RC; Ludy v. Ludy, 84 Ohio App. 195, 82 NE2d 775; Harper v. Harper, 98 Ohio App. 359, 129 NE 2d 471."

In considering the effect of the Ohio decrees, the Florida Appellate Court stated:[13]

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[11]371 US 187, 9 L Ed 2d 240, 83 S Ct 273 (1962).

[12]160 N.E. 2d 133 (Ohio 1959), 73 ALR 2d 1440.

[13]State ex rel Fox v. Webster, (Fla. App. 1963) 151 So 2d 14 at 15, App. 1-6).

> "It should be noted at the outset that prior to the proceedings in the case at bar, only the final decree of divorce rendered by the Ohio court on May 18, 1960, purported to adjudicate the issue of the fitness of the parties to have custody of the children and determine where custody should be placed for the best interests and welfare of the children. The Ohio decree of October 8, 1960, was coercive in nature and, though it had the effect of changing custody, it did not purport to do so on the basis of fitness or welfare. The subsequent California decree merely placed the stamp of approval on the Ohio decree of October 8, 1960."

The record refutes Florida's opinion. As in **Ford**, supra, Mrs. Webster first obtained custody of the minor children by agreement, incorporated into the final decree of divorce (R 19-24). We respectfully suggest that the Florida appellate court is in error when it states that only the original Ohio decree of May 1960 considered the fitness of the parties prior to the Florida proceedings (App. 4). Th record confirms that the Ohio decree of 8 October 1960 (PX 4, App. 10-32) was based upon a thorough, impartial investigation of the fitness of the father, Norbert Fox. If the investigation concerning the fitness of the mother is incomplete, it is because Mrs. Webster, after invoking the jurisdiction of Ohio, steadfastly refused to divulge the necessary information to arrive at a complete report. Certainly, the Ohio decree of 8 October 1960 was "coercive in nature" as are all court orders. But nowhere in this record can it be shown that the Ohio decree changing custody was based upon some alleged contempt of the mother. Can Mrs. Webster, having elected to invoke the

jurisdiction of Ohio, by fleeing that state, defeat Ohio's jurisdiction at her capricious whim? In the 8 October 1960 order, the Ohio court first denied the mother's petition for permission to remove the children and then changed custody to the father (PX 2, App. 10-12).

Armed with the Ohio order of 8 October 1960, Norbert Fox obtained from the California court a judgment awarding him custody of his children. In awarding the children to the father, at a time when Mrs. Webster, represented by counsel, was before the court with her children, the California court specifically found the Ohio decree to be valid. (App. 33)

> "We have a valid order of the Court of Common Pleas of Ohio, which is a good order, in my mind, a valid order, and this is primarily jurisdictional, and they did have jurisdiction over the parties at the time it made that order; and by reason of comity, and otherwise, I am going to grant this writ of habeas corpus."

Mrs. Webster was given the opportunity to obtain a supersedeas from the California judgment ordering her to relinquish custody to Norbert Fox. The California appellate court refused to grant the supersedeas (PX 5, App. 34-36). Mrs. Webster then fled from California to Puerto Rico via Florida. We suggest that the Florida court was bound, under Article IV, Section 1 of the United States Constitution, to give full faith and credit to the Ohio decree because until there were changed circumstances, although admittedly subject to modification, the decree of 8 October 1960 was res judicata as to the circumstances before the Ohio court.

The Ohio decree which the Florida appellate court described as "coercive in nature" was the same Ohio decree which the California court adjudicated to be "valid". If Florence Webster was of the opinion that the Ohio decree was not valid and therefore not entitled to full faith and credit as of the date of its rendition, California was the forum in which she was required to seek an adjudication. She commenced her resort to the appellate courts of California. On her own volition she abandoned appellate review. At the expiration of the appeal period the California judgment of validity became final. If not before, at that point the validity of the Ohio decree of 8 October 1960 became **res judicata**.

We respectfully submit that under the provisions of the Federal Constitution the Florida courts were without jurisdiction to relitigate the validity of the 8 October 1960 award. Absent a change of circumstances the Florida courts had absolutely no discretion under the provisions of the full faith and credit clause of the United States Constitution but to give to the Ohio decree the same validity that it enjoyed in Ohio. Contrary to what the learned Florida trial judge said, the onus was not upon Mr. Fox to return to Ohio and seek a modification of the decree granting **him** custody, but was upon Mrs. Webster to return to the jurisdiction which she had initially invoked to seek a modification of the custody decree.[14]

## CONCLUSION

We respectfully suggest that the time has arrived when this Court should no longer reserve decision on its interpretation of the full faith and credit provision as

[14] Footnote 8, supra, p. 19.

set forth in the United States Constitution, Article IV, Section 1, as it relates to valid custodial decrees. We respectfully submit that the law declared by the Florida courts in this case merits the careful attention of this Court.

It is respectfully submitted that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

PAUL A. LOUIS
Attorney for Petitioner
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Of Counsel
BERTHA CLAIRE LEE
1601 Alfred I. duPont Building
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EDWARD J. McBRIDE
506 Biltmore Way
Coral Gables, Florida

IN THE
DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A. D. 1963

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CASE NO. 62-445

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**NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.**

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STATE OF FLORIDA, ex rel.
NORBERT FOX, individually, and as next friend and legal custodian of DEBORAH ANN FOX and DENISE MARIE FOX, his two minor children,

Appellant,

vs.

FLORENCE J. WEBSTER, formerly known as FLORENCE J. FOX,

Appellee.

Opinion filed March 12, 1963.

An Appeal from the Circuit Court for Dade County, George E. Schulz, Judge.

Edward J. McBride, Paul A. Louis & Bertha Claire Lee, for appellant.

Everett H. Dudley, Jr., for appellee.

Before PEARSON, C.J., and HORTON and HENDRY, JJ.

HORTON, Judge.

The appellant husband was the petitioner in a habeas corpus proceeding in the Circuit Court of Dade County, Florida, in which he sought the custody of two minor children born to the parties during their marriage. This appeal is from an order discharging the writ of habeas corpus and continuing custody of the children in the appellee. We affirm.

This action arose out of the following facts. The appellee obtained a divorce from the appellant in the State of Ohio on May 18, 1960. The final decree incorporated the terms of a property settlement and custody agreement between the parties. By its terms, the appellee, **inter alia**, was awarded custody of the minor children of the parties on the express condition that she did not change the residence of the children without the approval of the appellant or the court. The appellant was granted reasonable rights of visitation.

On June 1, 1960, the appellee remarried, and on July 20, 1960, she filed a motion with the Ohio court requesting permission to remove the children to California. Hearing on the motion was scheduled for August 5, 1960. On July 28, 1960, the appellant filed a motion for change of custody, alleging that the appellee had never intended to live up to her undertakings in the separation agreement and had always intended to remove the children from the State of Ohio. A copy of this motion was personally served on the appellee.

On the day preceeding the hearing on her motion to remove, the appellee moved to California, taking the children with her. The appellant's petition for change of custody and appellee's motion for permission to remove were heard by the Ohio court after an extensive investigation by the Department of Domestic Relations. The appellee did not make an appearance. Based upon the appellee's apparent violation of the separation agreement and the final decree of divorce, the court, on October 8, 1960, entered an order which denied her motion for permission to remove the children from Ohio and ordered her to return them to the State of Ohio on or before October 4, 1960. The order further provided:

> " . . . (I)n the event she fails or refuses to return said children . . . the custody of the minor children . . . be and is hereby granted to the defendant who is ordered to return the children to the jurisdiction of this court.
>
> " . . . (I)n the event the plaintiff fails or refuses to return the minor children to the jurisdiction of this court . . . the orders heretofore made for the support of said children shall be and are hereby terminated until further order of this court."

Armed with this order, the appellant followed the appellee to California where he brought a habeas corpus proceeding. The California court granted the writ solely on the basis of comity, indicating that it considered the Ohio order dated October 8, 1960, to be valid. No inquiry was made into the fitness of either party to have custody of the children. Following an unsuccessful appeal, the

appellee and her husband took the children to San Juan, Puerto Rico. In July 1961, the appellee brought the children to Miami, Florida, where the appellant instituted the habeas corpus proceeding which culminated in the order appealed.

It should be noted at the outset that prior to the proceedings in the case at bar, only the final decree of divorce rendered by the Ohio court on May 18, 1960, purported to adjudicate the issue of the fitness of the parties to have custody of the children and determine where custody should be placed for the best interests and welfare of the children. The Ohio decree of October 8, 19[illegible], was coercive in nature and, though it had the effect of changing custody, it did not purport to do so on the basis of fitness or welfare. The subsequent California decree merely placed the stamp of approval on the Ohio decree of October 8, 1960.

Though he tacitly concedes that the Ohio decree of October 8, 1960, is not ipso facto entitled to full faith and credit, the appellant contends that both it and the California decree recognizing its validity should, in this case, have been accorded full faith and credit, or at least comity.

We find this contention to be without merit.

When jurisdiction vests in a custody case, the court has a duty to determine from the evidence where the minor child should be placed for its own best interest. DiGiorgio v. DiGiorgio, 153 Fla. 24, 13 So.2d 596. The court should not refuse to exercise jurisdiction or be deterred in the discharge of this duty by what it might be convinced is the bad faith of one parent in removing the child from a

sister state. DiGiorgio v. DiGiorgio, supra: see also Williamson v. Osenton, 232 U.S. 619, 34 S.Ct. 442, 58 L.Ed. 758. Further, a foreign decree involving the issue of custody is required to give way to a Florida decree based on the best interests and welfare of the minor involved. This is so because decrees affecting the custody of minor children are not considered final but may be modified from time to time should the circumstances and changed conditions indicate that the best interests and welfare of the minor require a change of custody. Avery v. Heermance, Fla.App.1962, 138 So.2d 775; Neal v. State, Fla.App.1961, 135 So.2d 891; Rhodes v. Bohn, Fla.App.1959, 114 So.2d 493, aff'd. 121 So.2d 779.

As to the rule of comity, a court is not required to accord comity to a foreign custody decree but may, within its discretion, do so where practical convenience and expediency make it desirable. Neal v. State, supra: Rhodes v. Bohn, supra.

Reverting to the case **sub judice**, it is true that the appellee apparently acted in bad faith in ignoring the orders of the Ohio and California courts. However, it was the duty of the trial court to base its determination of where the custody of the children should reside on their best interests and welfare and not on the good or bad faith of the parties. Further, the trial court was not required to give full faith and credit to the orders of the Ohio and California courts, nor, we conclude, did it abuse its discretion in refusing to accord them comity.

Appellant further contends that the record does not support the trial court's conclusion that custody of the two minor children should continue with the appellee. We

hesitate to sit in judgment of the trial court's view of the facts and since it has not been made to appear that it was guilty of an abuse of discretion in this regard, we must reject this contention.

What is said here is not intended to prejudice any rights of visitation the appellant has under the final decree of divorce or any right he might have in the future to seek a change in custody upon a showing that the best interests and welfare of the minor children require such a change. Nor do we condone the actions of the appellee. However, we must recognize the principle that in a case such as this, the paramount consideration is the best interest and welfare of the minor children.

The decree appealed is hereby affirmed.

PEARSON, Chief Judge (dissenting).

It is my view that a respect for law is an essential qualification for one seeking custody of a child. Bourn v. Hinsey, 134 Fla. 404, 183 So. 614, 616. I think that this record reveals a studied defiance of the courts of two states.

I would reverse.

IN THE
SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1963

MONDAY, OCTOBER 28, 1963

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CASE NO. 32,769

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STATE OF FLORIDA, ex rel., NORBERT FOX, individually, and as next friend and legal custodian of DEBORAH ANN FOX and DENISE MARIE FOX, his two minor children,

Petitioner,

vs.

FLORENCE J. WEBSTER, formerly known as FLORENCE J. FOX,

Respondent.

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ORDER ALLOWING CERTIORARI

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The Petition herein for a Writ of Certiorari to the District Court of Appeal, Third District of Florida, is granted.

It is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the Petition, be filed as though in response to such Writ.

It is further ordered that said cause be set down for oral argument on jurisdiction and merits at 9:30 o'clock A.M. on Tuesday, December 3, 1963.

A True Copy
TEST:
GUYTE P. McCORD
Guyte P. McCord
Clerk Supreme Court.

(SEAL)

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IN THE
SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1964
WEDNESDAY, JANUARY 22, 1964

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CASE NO. 32,769

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STATE OF FLORIDA, ex rel., NORBERT FOX, individually, and as next friend and legal custodian of DEBORAH ANN FOX and DENISE MARIE FOX, his two minor children,

Petitioner,

vs.

FLORENCE J. WEBSTER, formerly known as FLORENCE J. FOX,

Respondent.

---

The petition for writ of certiorari in this cause re-

flects probable jurisdiction of the cause in this court. We issued the writ and have heard the arguments of the parties. After hearing arguments and upon further consideration of the matter, we have determined that the petition is without merit, therefore, the writ must be and it is hereby discharged and the petition for writ of certiorari dismissed.

A True Copy
TEST:
GUYTE P. McCORD
Guyte P. McCord
Clerk Supreme Court.

(SEAL)

**EXHIBIT 2**

**Filed 4-23 A.D. 1962**

**Case No. 2336**

**GEORGE E. SCHULZ,**
**Circuit Judge**

**IN THE COURT OF COMMON PLEAS**

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**NO. 706,725**

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COUNTY OF CUYAHOGA )
STATE OF OHIO )
) SS:

FLORENCE J. FOX

Plaintiff,

-vs-

NORBERT FOX,

Defendant

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**JOURNAL ENTRY**

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October 8, 1960

This matter coming on to be heard upon the motion of the Plaintiff to move children from Cuyahoga County, and motion of Defendant to modify custody the Court being fully advised in the premises, and having received the

report and recommendation of the Department of Domestic Relations finds that service was had according to law and that a notice of the recommendation was delivered to both parties or their counsel on September 21, 1960 and that no motion for an oral hearing before the Court has been filed pursuant to Rule 23(d) of the rules of this Court, and that therefore the parties are found to have waived their right to any further hearing thereon:

The Court further finds that by order of this Court heretofore rendered, the custody of the minor children of the parties was awarded to the Plaintiff and that the Defendant was ordered to pay the sum of $120.00 per month for support of the minor children.

The Court further finds that the Plaintiff has removed the Children from the State of Ohio contrary to the provisions of the separation agreement and decree.

The Court further finds that the Defendant is fully paid under said order.

The Court further finds that by reason of the changed conditions and circumstances since the date of the previous order, the same should be modified.

WHEREFORE, IT IS ORDERED ADJUDGED AND DECREED that the motion of the plaintiff for permission to remove the children from the County of Cuyahoga be and is hereby denied.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Plaintiff shall return the minor children to the County of Cuyahoga and the State of Ohio on

or before October 4, 1960, and in the event she fails or refuses to return the said children to the jurisdiction of the Court the custody of the minor children Deborah Ann, Born October 21, 1954, and Denise Marie, born June 21, 1956, be and is hereby granted to the defendant who is ordered to return the children to the jurisdiction of this Court.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that in the event the plaintiff fails or refuses to return the minor children to the jurisdiction of this Court or fails or refuses to turn the said children over to the defendant at his request upon the operation of this order transferring custody of said children to the defendant the orders heretofore made for the support of said children shall be and are hereby terminated until further order of the Court.

s/ Charles W. White
Judge

divorce journal 352 page 590

No. 706,725

# Cuyahoga Common Pleas

LAWRENCE FOX

vs.

NORBERT FOX

## Copy of Journal Entry

LA

Nº 41989

The State of Ohio, }
CUYAHOGA COUNTY } ss.

I, EMIL J. MASGAY, Clerk of the Common Pleas Court within and for said County, and in whose custody the Files, Journals and Records of said Court are required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied from the divorce Journal 352 page 590 of the proceedings of the Common Pleas Court within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal 352 dated October 8, 1960 and that the same is a correct transcript thereof.

In Testimony Whereof. I do hereunto subscribe my name officially and affix the seal of said Court, at the Court House in the City of Cleveland, in said County, this 8th day of September, A. D. 1961

EMIL J. MASGAY, Clerk of Courts.

By Lillie Parker Zack Deputy Clerk

**PLAINTIFF'S EXHIBIT 4**
**Filed 4-24 A.D. 1962**

**Case No. 2336**

**GEORGE E. SCHULZ, Circuit Judge**

**COUNTY OF CUYAHOGA**
**Cleveland, Ohio**

THE COURT OF COMMON PLEAS
Department of Domestic Relations
Room 50, Court House
E. Dana Brooks,
Director

April 23, 1962

Re: **706,725 Fox**

TO WHOM IT MAY CONCERN:

This is to certify that the attached photostatic copy of the report of the Department of Domestic Relations upon the motion to change custody and control of the minor children, Deborah Ann and Denise Marie Fox, filed July 28, 1960, is a true and correct copy of the Department of Domestic Relations relating to such motion. Further the records of this Court show that a notice of the recommendation was delivered by certified mail to the plaintiff, Florence J. Fox also known as Mrs. R. L. Webster, the same being certified on September 26, 1960, bearing certified No. 808380, is a part of the Department's file in the above action.

The recommendation of the Department of Domestic Relations was reduced to a journal entry and signed by

the presiding judge, and appears of record in journal volume 352, page 590.

Yours very truly,

E. DANA BROOKS
E. Dana Brooks

EDB/jp
Enc.

**THE COURT OF COMMON PLEAS — DIVISION OF DOMESTIC RELATIONS**

**Report to the Court**

Date: 7-28-60 Motion filed by DEFT. Nature: CHANGING CUSTODY AND CONTROL FROM PLTFF. TO DEFT. (C&V)

Case Number: 706,725

FLORENCE J. FOX, 4345 Martin Dr., North Olmsted, Ohio. Att'y.: Rosenthal, Bosch & Buckman, 1078 Union Commerce bldg., MA-1-2400

vs.

NORBERT FOX, 3871 Columbia rd. Employed:, Food Town, Madison ave. Att'y.: Martin E. Franey, 727 National Bank bldg., Pr-1-0157.

| CHILDREN: | Ages: | Residing with: | Custody: |
|---|---|---|---|
| Deborah Ann | 10-21-54 | pltff. | |
| Denise Marie | 6-21-56 | " | |

COURT ORDER: Decree for pltff. Date: 5-18-60
Journal: 351, page 517 Custody:

ALLEGATIONS: Deft. says that it is not in the best interest of the children that they be reared in the Los Angeles area with the pltff. and her new husband.

REPORT:

IDENTIFYING INFORMATION

| MOTHER | FATHER |
|---|---|
| Birthdate: age 28, born 6-1-32 | Birthdate: age 30, born 2-25-30. |
| Birthplace: Cleveland, Ohio | Birthplace: Cleveland, Ohio |
| Religious Affiliation: Roman Catholic | Religious Affiliation: Roman Catholic |
| Employed at: Unknown | Employed at: Fairview Park Fire Dept. |
| Occupation: Unknown | Occupation: Fireman |
| Claimed average earnings: | Claimed Average Earnings: States $5700 gross earnings per year, Allied Vending Co. part time. $30 net earnings per mo. |
| Marital History: No previous marriage. | Marital History: No previous marriage. |
| 1st husband Norbert Fox. See data on father. | 1st wife Florence Jerman, married 6-27-53 at St. Mary's Church, Olmsted Falls. Divorced 5-18-60 J351 p 517. Father not remarried. |
| 1st wife | |
| 2nd husband, Richard Webster, not previously married. Date and place unknown. | |

STATEMENT OF LITIGANTS — FATHER

8-26-60. To 3871 Columbia Rd. Door opened but could get no response.

9-2-60. To 3871 Columbia Rd. to interview father. No response.

9-2-60. To 20795 Lorain Rd., Fairview, at Fairview Fire Dept. Father not working this day. Left notice with Captain Willard for father to come to D.D.R. on 9-6-60 for interview.

9-6-60. Father interviewed at D.D.R. States parties last lived together at 3871 Columbia Rd. when they began to have marital problems. They both went to Denison Family Service Ass'n. and father is still working with the agency. In 1958 the mother filed divorce action and he agreed to leave the home. He roomed at the home of a Mrs. Mary Kuchta at 2034 Quail Ave. in Lakewood for six weeks. Father states he has not served in the armed forces.

Said when parties lived together, mother insisted on working and then they alternated on the care of the children. Mother had a job at the Ludwid Restaurant and began to stay out until 4 or 5 A.M. / Felt there was something fishy about the situation and he began to check on the mother thru his friends. Mother said she was with girl friends and then he found mother was seeing a man named Richard Webster. Mother knew this man, who had also visited in their home. Then parties on the advice of attorney separated to see if situation could be improved.

States while separated he visited the children once a week. Says he followed the mother to Richard Webster's Parents' home one night and found the mother and Richard "loving" on the floor. He broke into the home and mother said they were only sitting on the floor to watch TV. He ordered the mother to leave and go home. A few days later he moved back into the home and on February 25, 1958 mother filed the divorce action.

Claims in October 1958 the mother and children went to California by plane. Mother left a note on the table stating she was going to California and would send her address later. He did not hear from the mother for 3 or 4 months and mother and children returned to Cleveland in January 1959. In May 1959 mother returned to California again with the children and remained there until May 1960. During this period parties corresponded and he sent support during this period and has receipts to verify it.

When mother returned to Cleveland in May 1960, the parties were divorced. They came to an agreement about the property and he agreed for mother to have custody of the children and he would pay $120 per month for support.

Said he visited the children regularly from time of divorce until July 31, 1960. Says the mother was remarried on June 1, 1960 to Richard Webster in Lakewood, Ohio (but is not certain of place). Says Mr. Webster is employed by Trans World Airlines in California and he returned to his job. In July 1960 the mother asked him if she could go to California with the children to live with her husband. States he told the mother she could go but she should not take the children.

States he filed a Court action and mother was served with the papers. On August 5, 1960 he went to Court with his attorney and mother failed to appear. Mother's attorney appeared at the hearing and said he was no longer representing the mother because mother went to California by plane on July 31, 1960. Claime he received one letter from the mother stating she was in California, had to leave in a hurry because present husband was sick and plans to live there permanently. Said he has been sending support payment to R. L. Webster, P.O. Box 90091 Airport Station, Los Angeles 45, California.

Said he filed the action and is asking for custody for the following reasons.

1. Has a good home to offer at 3871 Columbia Rd. Mr. Boyeson, present roomer, will move to Florida in October or November, 1960.

2. He will have paternal grandparents, Margaret and Herman Fox of 2163 Wyandotte Ave. move into his home and care for children while he is employed.

3. Feels mother should see a psychiatrist because mother comes first to herself and the children come second.

4. Says children won't go to Catholic School which mother agreed to do in the agreement. If Children are with him they will attend St. Richard School.

5. Children told him the mother "crabs" a lot

and want to know why they can't live with him.

6. Mother moved the children to 8 different places in the past year.

7. Children said while living with the mother in California, Webster lived in the home and mother was not yet divorced or remarried.

9-14-60. Father again interviewed at 3871 Columbia Rd. at time of home investigation. States mother returned to California on August 4, 1960 just the day before the Court hearing. Father showed various letters from the mother written from California, on two previous trips there during pendency of the divorce. One letter from the mother mentioned "it is now my turn to take care of the baby". Father also showed photostatic copies of letters he intercepted from Mr. Webster to the mother. This letter implied the mother might have been pregnant and going to a doctor. Father stated again that children said Mr. Webster lived in the home with them and the mother, and children mentioned another little baby in the home.

PRESENT HOME OF CHILDREN WITH MOTHER

LOCATION AND DESCRIPTION — Mother reported by father as living in California. Address listed by the father is c/o R. L. Webster, P.O. Box 90091, Airport Station, Los Angeles, 45 California. Out of Town custody request made on 9-6-60.

HOME PROPOSED BY THIS MOTION WITH FATHER

LOCATION AND DESCRIPTION — 9-14-60. 3871 Columbia Rd., North Olmsted, Ohio. This is a five room two bedroom single frame dwelling. Rooms clean and well furnished.

OCCUPANTS OF HOME — Father and Mr. Boyeson, roomer, occupy the home.

SCHOOL FACILITIES — Within normal distance of all schools.

RECREATIONAL FACILITIES — Good. Large yard provides adequate play area for children of this age.

CARE AND SUPERVISION GIVEN CHILD — Father states he plans to have the paternal grandparents, Margaret and Herbert Fox, move into the home and give care to the children while he is employed.

EVALUATION — A. Physical aspects of home good and approvable.

EVALUATION — B. References indicate children would receive adequate care and supervision.

**Mrs. Florence Jarman**, maternal grandmother, interviewed at 4345 Martin Rd., North Olmsted, states after the litigants were divorced the mother and two children lived in Avon Lake, Ohio after the mother remarried. The home in Avon Lake was sold and mother had to move out on July 20th 1960. Mother and two children returned to the maternal grandmother's home and stayed for 2 weeks. Maternal grandmother states she does not know the

mother's second husband's name. Claims, "We are a catholic family, do not recognize divorce, we didn't want to know anything about the remarriage and would not permit mother to come to our home with her second husband."

Says the maternal grandfather went to Ireland on July 15, 1960. Claims when mother had to move suddenly on July 20th, 1960, she permitted the mother and 2 children to come to the home but refused the mother's second husband to come there. Claims she told the mother, "Leave me out of everything and don't discuss your affairs with me". Two weeks later, she woke up one morning and had a telephone call from the airport stating the mother and 2 children had gone to California and left the maternal grandmother's car at the airport. Claims she does not know the mother's address in California. Said the mother is an excellent mother, the stepfather adores the children and mother loves the children. States the father is a deceitful person, his one love was money, father took in a boarder only to get money and mother said father was happy with one day visits with the children. Doesn't know why the father would ask for custody because he has no one to care for them. Says mother agreed for father to visit with the children twice a year and she would send the children to Cleveland. Says for the interest of the children it would be the best thing for the mother to live in California.

9-2-60. **Captain Willard** of Fairview Park Fire Department, interviewed at 20795 Lorain Rd. States father is a hard worker, is steady, dependable and of good repute. Says father has 2 jobs, works as a fireman and fills candy machines on second job. Captain agreed to give notice to father to appear at D.D.R. for interview.

9-12-60. To 3596 Warren Rd. to interview Thonnings family, father's reference. Not at home.

9-14-60. **Mr. Frank Boyeson**, age 79, father's reference, interviewed at 3871 Columbia Rd., North Olmsted, Ohio. States he formerly lived at 3860 Columbia Rd. with his wife and was a neighbor to the litigants for some time. Said he visited in the home when litigants were getting along well and says both parents loved their children. States the mother was a good housekeeper, gave good average care and children were happy with the mother. Felt the mother was mentally weak. Claims the father worked and was a good father. Said his wife died and on July 22, 1960, he moved into the father's home and pays $10 a week for room and contributes towards the food. States he planned to go to Florida for the winter but since he heard the news about the devastation caused by hurricane Donna, he is not certain he will go.

9-14-60. **Mr. Nelson Brown**, manager, interviewed at 23370 Lorain Rd., North Olmsted. Says the mother was employed as a waitress. Ludwigs' Restaurant at one time, was a good worker and a nice person. Knows nothing about mother's behavior after work. Mother brought her children in the restaurant for occasional visits and children appeared to get adequate care.

9-14-60. **Donald and Laverne Therens**, father's reference, interviewed at 24046 Frank Ave., North Olmsted, state they have known the father over 20 years and Mr. Therens helped father get his job as a Fairview Park Fireman, where he too is employed. Said both parents loved the children and when mother worked nights the father baby-sat with the children. Said several times

father asked him to go with him to watch the mother and witness her behavior. Said the mother was "traipsing" quite a bit, but never saw her with any specific person. Father showed him a love letter written to the mother by her present husband and father had intercepted the letter. Stated father would give children adequate care if granted custody.

9-14-60. To 3596 Warren Rd. to interview father's reference Llbonning family. Upstairs tenant reports family gone away on vacation.

9-16-60. **Mrs. Ann Martinka**, father's reference, interviewed at 3491 Spencer Rd., Rocky River, Ohio. States she was a former neighbor to litigants for about 4 years. Mother was a clean housekeeper, children were usually with the mother who kept them clean and gave adequate physical care. Both parents loved the children but father was more loving and devoted to the children.

9-16-60. To 2040 Wyandotte Ave., Lakewood to interview former neighbors of litigants'. Not known to present tenants.

9-16-60. **Mrs. Julia Thorp**, former neighbor, interviewed at 2044 Wyandotte Ave., Lakewood. Said litigants were her neighbors for 2 years and had their first child while living there. Mother was a good average housekeeper, canned, washed clothing, was a good mother and kept child clean. Both parents loved the child, father was a hard working, good man and a devoted father.

9-16-60. To 2048 Wyandotte Ave., Lakewood, to interview former neighbor. Present tenant just moved in about 1 year ago and litigants are not known to her.

REPORTS OF OTHER COURTS AND SOCIAL AGENCIES.

9-13-57 Family Service Ass'n. 160251 active at Jack Tremont.

3-7-58 D.D.R. 706,725.

No additional reports as of 8-8-60.

9-7-60. Checked Police Court records. Found following information.

No reports on father or mother.

Stepfather Robert L. Webster born 8-9-35 arrested 6-4-56 for traffic.

9-8-60. Took agency request form to social worker, Mrs. Freelander of Jackson Tremont Family Service Ass'n. at 3201 for report to be sent to D.D.R. (see attached).

9-19-60. Checked Probate Court records on marriage of mother to Richard Webster. Unable to verify.

9-16-60. **Margaret and Harry (aka Herman) Fox,** paternal grandparents interviewed at 2163 Wyandotte Ave., Lakewood, Ohio. Said the litigants lived down at the other end of this street for two years. Said they always helped them whenever they were needed, but kept out of the litigants' business, as much as they could. While living in that area five years ago litigants had only the first child Debbie. Mother gave adequate physical care but ran around a good deal and left child in care of the father.

Mother did not get along well with maternal grand-

parents, felt she was treated like a stepdaughter and constantly talked against them. Said this is the third time the mother and children have been living in California since parties were separated. Felt mother was upset about something, even prior to the marriage and mother said she went to a psychiatrist but it did not help her. Said father is a "home body", loves the children and would give good care if granted custody. State mother was not affectionate towards the father or the children and father was much more affectionate with the children. If father had custody they would be willing to help in any way. They would be willing to care for children while father is employed, but only on a temporary basis and not a permanent basis.

FINANCIAL ASSETS AND OBLIGATIONS—FATHER

Home at 3781 Columbia Rd., North Olmsted, formerly jointly owned. Cost $18,000, mortgage of $12,000 still exists payable $103 per month. At time of divorce mother deeded her share of the home to the father. Father states he borrowed $4,000 from the paternal grandparents, paid the mother $2500 and is paying $100 per month on $1300 still due to the mother on the property settlement. Father owns a car. Ford stationwagon 1951—clear of debt.

FINANCIAL ASSETS AND OBLIGATIONS—MOTHER
Unknown.

SUPPORT — Father claims he has receipts to verify he is paid up to date on $30 per week support.

SUMMARY AND INVESTIGATOR'S CONCLUSIONS.

A. Father's proposed home is approvable and references indicate children would receive adequate care and supervision.

B. Out of Town Custody Investigation request sent to Los Angeles, California on 9-6-60, for report on mother's home and care of the children.

C. According to references, both parents ask for custody.

H. Morris/mh

9-21-60 Mr. Franey, counsel for deft. appeared alone. Personal service was had on the mother on motion to modify custody on July 30, 1960 at which time there was a motion by the mother for permission to take children out of the jurisdiction pending, which was filed July 20, 1960. The mother's counsel has withdrawn because she left Cleveland while her motion and this motion was pending taking the children with her without permission from the Court.

In the opinion of E. D. Brooks the mother is legally in Court both on her motion and on the motion of the father.

A letter was received from the mother by the father dated 8-9-60 stating that she was in Los Angeles giving only a Post Office Box No. 90091.

E. D. Brooks called Trans World Airlines Cleveland

office and Mr. Dupuis WI 1-9700 reported that the step-father, Mr. Webster, had formerly worked for them in Cleveland, but the only information as to his present place of employment for the same Airline would be given by T.W.A. Industrial Relations office, Mr. J. P. Clifford Employment office Hangar 12, New York International Airport. or T.W.A. Employment office, 10 Richards Rd., Kansas City, Missouri.

In view of the fact that the mother was legally in Court by reason of service and her pending motion to modify, a recommendation was made that custody be removed from her if she failed to return the children to Cleveland by 10-1-60 and if she did not turn over the children to the father the support order was to be terminated as of that date. Copy mailed to mother by certified mail 808,380.

9-26-60 Return receipt No. 808,380 received showing that the notice was received by Mrs. Robt. Webster (mother)

NO MOTION FOR ORAL HEARING FILED, Journal Entry prepared in accordance with recommendation and notice and submitted to Court for signature.

**DEPARTMENT OF DOMESTIC RELATIONS**
**NOTICE OF RECOMMENDATION**

Counsel and parties will take notice that under the provisions of Rule 23(d) of the Rules of the Court of Common Pleas of Cuyahoga County, Ohio, the report and recommendation of the Department of Domestic Relations will be approved by the Court without an oral hearing

thereon before the Court, unless a motion for such oral hearing is filed within five (5) days from the date of notice of such recommendation.

The motion in the within action will be held until October 4, 1960 and in the event no motion for an oral hearing is filed prior to that date, an entry will be submitted to the Court for signature.

Case No. 706725 Date 9-21-60
Name Fox

THE DEPARTMENT OF DOMESTIC RELATIONS
By E. Dana Brooks

**JOURNAL ENTRY TO BE RECOMMENDED**

This matter coming on to be heard upon the motion of the Pltff to move chldn from Cuyahoga County, and motion of Deft to modify custody the Court being fully advised in the premises, and having received the report and recommendation of the Department of Domestic Relations finds that service was had according to law and that a notice of the recommendation was delivered to both parties or their counsel on 9-21-60 and that no motion for an oral hearing before the Court has been filed pursuant to Rule 23(d) of the rules of this Court, and that therefore the parties are found to have waived their right to any further hearing thereon.

The Court further finds that by order of this Court heretofore rendered, the custody of the minor children of the parties was awarded to the Pltff and that the Deft was ordered to pay the sum of $120 per mo for support of the

minor children. The Court further finds that the Pltff has removed the chldn from the State of Ohio contrary to the provisions of the separation agreement and decree.

The Court further finds that the Defendant is fully paid under said order.

The Court further finds that by reason of the changed conditions and circumstances since the date of the previous order, the same should be modified.

WHEREFORE, IT IS ORDERED ADJUDGED AND DECREED that the motion of the Pltff for permission to remove the children from the County of Cuyahoga be and is hereby denied.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the plaintiff shall return the minor chldn to the County of Cuyahoga and the State of Ohio on or before October 4, 1960 and in the event she fails or refuses to return the said chldn to the jurisdiction of the Court the custody of the minor chldn Deborah Ann born Oct. 21, 1954, and Denise Marie, born June 21, 1956, be and is hereby granted to the defendant who is ordered to return the chldn to the jurisdiction of this Court.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that in the event the plaintiff fails or refuses to return the minor chldn to the jurisdiction of this Court or fails or refuses to turn the said chldn over to the defendant at his request upon the operation of this order transferring custody of said chldn to the defendant the orders heretofore made for the support of said chldn shall be and are hereby terminated until further order of the Court.

Copy to: Herbert Rosenthal, atty for pltff, 1078 Union Com. Bldg.

Copy to: Pltff, Mrs. R. L. Webster, P. O. 90091, Airport Station, L. A. 45, California by certified mail.

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**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES**

DEPARTMENT NO. 95 HON. ALLEN MILLER, JUDGE

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H. C. 75853

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In the Matter of the Application of
NORBERT FOX

For Writ of Habeas Corpus.

REPORTER'S TRANSCRIPT

March 6, 1961

APPEARANCES:

For the Petitioner:

WALTER N. ANDERSON
Attorney at Law
3325 Wilshire Boulevard
Los Angeles 5, California

For the Respondent:

V. LANE KNIGHT
Attorney at Law
504 Main Street
El Segundo, California

Anne F. Smith, C.S.R.
Official Reporter
1934 Hospital Place
Los Angeles 33, California

Tr. 34:

received in evidence.

I find in this case that both parties would be, if I had the matter of custody before me in de novo that I would find both parties are fit and proper parties to have the custody of these children.

However, the situation involved in this case is a matter primarily of jurisdiction. We have a valid order of the Court of Common Pleas of Ohio, which is a good order, in my mind, a valid order, and this is primarily jurisdictional, and they did have jurisdiction over the parties at the time it made that order, and by reason of comity, and otherwise, I am going to grant this writ of habeas corpus.

I am going to stay execution thereof for three days and I am going to make an order, specific order, that the children are not to be removed from their present residence or out of the county of Los Angeles pending the three day stay of execution.

It is my hope that the parties themselves may make some arrangements mutual to themselves for right of visitation by the parties. I think they are interested in the welfare of the children and I think some arrangements should be made voluntarily in carrying out somewhat the original agreement which was made with respect to custody of these children by way of right of visitation of both parties, but the writ is granted and stayed three days.

MR. ANDERSON: Your Honor, when would this stay expire?

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**EXHIBIT 5**
**Filed 4-24 A.D. 1962**

**Case No. 2336**

**GEORGE E. SCHULZ,**
**Circuit Judge**

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**SECOND APPELLATE DISTRICT**

**DIVISION THREE**

IN THE MATTER OF THE APPLICATION OF
NORBERT FOX, Petitioner,
for Writ of Habeas Corpus.

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**2nd Civil No. 25374**

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PETITION for Writ of Supersedeas. Denied.

For Petitioner: V. Lane Knight.

For Respondent: Walter N. Anderson.

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Florence Webster, who was respondent in a writ of habeas corpus issued by the Superior Court of the State of California in and for the County of Los Angeles, has appealed from an order of that court which granted to Norbert Fox, hereafter called respondent, a writ of habeas corpus under which Florence Webster, hereafter called the appellant, is compelled to deliver custody of the minor children of the parties to the respondent petitioner in the habeas corpus matter.

We issued an order to show cause why the writ of supersedeas should not issue. We have examined the records of the proceedings before the superior court which have been submitted to us. From those records we are convinced that there is no substantial question to be presented upon the appeal and that a writ of supersedeas should not issue.

The order to show cause is discharged and the writ of supersedeas is denied.

NOURSE, J. pro tempore.

We concur:

SHINN, P.J.
FORD, J.

[Civ. No. 25374, Second Dist., Div. Three. Mar. 23, 1961.]

**In re NORBERT FOX on Habeas Corpus.**

(1) **Appeal—Supersedeas.—Where no substantial question is presented on appeal, a writ of supersedeas should not issue.**

PETITION for a writ of supersedeas. Writ denied.

V. Lane Knight for Petitioner.

Walter N. Anderson for Respondent.

NOURSE, J. pro tem.*—Florence Webster, who was respondent in a writ of habeas corpus issued by the Superior Court of the State of California in and for the County of Los Angeles, has appealed from an order of that court which granted to Norbert Fox, hereafter called respondent, a writ of habeas corpus under which Florence Webster, hereafter called the appellant, is compelled to deliver custody of the minor children of the parties to the respondent, petitioner in the habeas corpus matter.

We issued an order to show cause why the writ of supersedeas should not issue. We have examined the records of the proceedings before the superior court which have been submitted to us. (1) From those records we are convinced that there is no substantial question to be presented upon the appeal and that a writ of supersedeas should not issue.

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(1) See Cal.Jur.2d, Appeal and Error, § 231.
McK. Dig. Reference: (1) Appeal and Error, § 425.
[1] Advance Report Citation: 185 A.C.A. 839, 842.

The order to show cause is discharged and the writ of supersedeas is denied.

Shinn, P. J., and Ford, J., concurred.

SRARY
COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 29 1964
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

No. [redacted] 142

October Term, 1963

STATE OF FLORIDA, ex rel., NORBERT FOX, individually, and as next friend and legal custodian of DEBORAH ANN FOX and DENISE MARIE FOX, his two minor children,

Petitioner,

- vs -

FLORENCE J. WEBSTER, formerly known as FLORENCE J. FOX,

Respondent.

On Petition For a Writ of Certiorari To the District Court of Appeal of Florida, Third District

## BRIEF FOR THE RESPONDENT IN OPPOSITION

EVERETT H. DUDLEY, JR.
Attorney for Respondent
296 East Third Avenue
Hialeah, Florida

## TOPICAL INDEX TO BRIEF FOR RESPONDENT IN OPPOSITION


| | Page |
|---|---|
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statement of the Case | 3 |
| Argument | 5 |
| Conclusion | 11 |
| Supplemental Appendix | SA 1 |
| Protest as to Petitioner's Statement of Facts | |
| Proof of Service | |

## TABLE OF CITATIONS

### CASES


| | Page |
|---|---|
| Bastian v. Bastian (1959 Ohio) 160 NE 2d 133, 73 ALR 2d 1440 | 8 |
| Di Giorgio v. Di Giorgio (1943 Fla.) 153 Fla. 24, 13 So.2d 596 | 7 |
| Kovacks v. Brewer (1958) 356 US 604, 2 L Ed 2d 1008, 78 S Ct 963 | 10 |
| May v. Anderson (1953) 35 US 528, 97 L Ed 2d 1224, 73 S Ct 963 | 10 |
| Milligan v. Wilson (Fla. 1958) 104 So.2d 35 | 5 |
| Mobile County v. Williams (Ala. 1913) 180 Ala. 639, 61 So. 963 | 6 |
| Neal v. State (1961 Fla. App.) 135 So.2d 891 | 7 |
| People ex rel Wagner v. Torrence, 94 Colo. 47, 27 P 2d 1038 | 9 |
| State v. Rasco (Fla. 1958) 139 Fla. 349, 190 So. 510 | 5 |


### CONSTITUTIONAL PROVISIONS


| | |
|---|---|
| 28 U.S.C. Section 1257 (3) | 2 |
| Article IV, Section 1 of the Constitution of the United States | 5 |

IN THE

# Supreme Court of the United States

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## No. 1174

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**October Term, 1963**

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STATE OF FLORIDA, ex rel., NORBERT FOX, individually, and as next friend and legal custodian of DEBORAH ANN FOX and DENISE MARIE FOX, his two minor children,

Petitioner,

- vs -

FLORENCE J. WEBSTER, formerly known as FLORENCE J. FOX,

Respondent.

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**On Petition For a Writ of Certiorari To the District Court of Appeal of Florida, Third District**

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### PREFACE

The Petitioner below, Norbert Fox, will be referred to as the Petitioner or husband and the Respondent below, Florence J. Webster, formerly known as Florence J. Fox, will be referred to as the Respondent or wife.

The wife's present husband will be referred to by his own name. The following symbols will be used.

"R" for "Record on Appeal"

"P" for "Petition for Writ of Certiorari"

"PA" for "Petitioner's Appendix"

"SA" for "Supplemental Appendix of Respondent"

"PX" for "Petitioner's Exhibits"

"RX" for "Respondent's Exhibits"

All emphasis is that of the Respondent unless otherwise indicated.

## JURISDICTION

It is respectfully contended by the Respondent that the Petitioner is erroneously seeking to invoke the jurisdiction of this Court under 28 U.S.C. Section 1257 (3) inasmuch as no title, right, privilege or immunity of the Petitioner has been denied, abridged or drawn in question.

## QUESTIONS PRESENTED

(1) DID A FLORIDA COURT, IN DETERMINING THE QUESTION OF CUSTODY OF CHILDREN WITHIN ITS JURISDICTION, IMPROPERLY DENY FULL FAITH AND CREDIT OR COMITY TO A VOID OHIO DECREE PURPORTING TO CHANGE THEIR CUSTODY TO THE FATHER SUBSEQUENT TO A VALID OHIO DIVORCE DECREE GRANTING CUSTODY TO THE MOTHER?

(2) DID THE SAID FLORIDA COURT IMPROPERLY DENY FULL FAITH AND CREDIT OR COMITY TO A CALIFORNIA DECREE PURPORTING TO RECOGNIZE BY COMITY, WITHOUT REGARD TO ITS MERITS, THE SAID VOID OHIO DECREE?

## STATEMENT OF THE CASE

Norbert Fox, on April 12, 1962, filed a Petition for a Writ of Habeas Corpus against his former wife, Florence J. Webster, formerly known as Florence J. Fox, seeking custody of the two minor children who were born to the parties during their marriage (R.Vol.II, 19-24). As grounds for his Petition, the husband, Fox, relied upon an Order of the Ohio Court of Common Pleas, dated 8 October, 1960, allegedly granting him custody of the children (PX 2) and a subsequent Order of the Superior Court of the State of California purporting to recognize, by comity, the Order of the Ohio Court (R.Vol.VI, 182, PA 32-33). On the same day, April 12, 1962, a Writ of Habeas Corpus issued from the Circuit Court of Dade County, Florida, ordering the wife to produce the children and to show cause why they should not be released to the husband (R.Vol.II, 25).

Thereafter, following an extensive hearing during which many exhibits and the oral testimony of numerous witnesses were presented, the Court, on May 8, 1962, entered a final Order adjudging that, for the best interests and welfare of the minor children, their care and custody should remain with the Respondent-mother. (R. 332, P 15). Subsequently, the Petitioner-husband appealed to the District Court of Appeal, Third District, of the

State of Florida. After the filing of briefs and oral argument of counsel, the said Appellate Court affirmed the Trial Court in a two to one decision on March 12, 1963, (Rehearing denied April 2, 1963) **State ex rel Fox v. Webster**, 151 So.2d 14, (Fla.App. 1963)(PA 1-6).

Subsequently, on May 29, 1963, the Petitioner-husband filed his Petition for Writ of Certiorari with the Supreme Court of Florida (R.Vol.I, 1-13). The Writ issued on October 28, 1963 (R.Vol.V, 337, PA 7). After hearing oral argument of counsel, the Florida Supreme Court determined that the Petition was without merit and thereupon discharged the Writ and dismissed the Petition on January 22, 1964 (R.Vol.V, 338, PA 8). Thereafter, on March 2, 1964, the Supreme Court of Florida denied the Petitioner-husband's Petition for Rehearing (R.Vol.V, 341), whereupon he filed his Petition for Writ of Certiorari in this Court.

In his statement of the Background of the Controversy (P 4-15), the Petitioner has once again incorporated an outrageous presentation of scandalous, distorted, biased and impertinent reargument of the alleged facts brought out in the Trial Court, the District Court of Appeal of Florida, Third District, and in the Supreme Court of Florida. The said alleged facts do not accurately and faithfully reflect the existing record and, in the opinion of the Respondent, the presentation of the same in the Petition for Writ of Certiorari is a violation of the spirit and letter of the rules of this Court. (See Supplemental Appendix) (SA 1-7)

## ARGUMENT

Throughout all levels of the proceedings below, the Respondent has continuously maintained and proved the following basic contentions which lie at the heart of the litigation here being considered.

(a) That the Ohio Decree of October 8, 1960 (R.Vol. VI, 87, PX 2, PA 10-12), **which required Respondent to act on or before October 4, 1960, four days prior to its entry,** was for this, and the many other reasons expressed in the proceedings below, void on its face at the time it was entered and was therefore, under Florida law, not entitled to consideration by the Florida Court either under the doctrine of comity or under the provisions of the Full Faith and Credit Clause of the United States Constitution.

With reference to the matter of full faith and credit, the Florida Supreme Court expressed this view in deciding the case of **Milligan v. Wilson** (Fla.1958) 104 So.2d 35, 36, when it stated:

> " . . . that under Article IV of the Constitution of the United States, full faith and credit is accorded only to valid judgments of the courts of sister states."

As to comity, in **State v. Rasco** (Fla.1939) 139 Fla. 349, 190 So. 510, 511, the Florida Supreme Court said:

> " . . . the doctrine of comity plays no part in the adjudication of such cases [child custody cases]. Neither are decrees in such cases protected by

> the full faith and credit provisions of the Federal Constitution. This on the theory that the welfare of the child is the question of primary consideration, and this can best be determined by the Court who has jurisdiction of it and in whose jurisdiction it resides."

(b) That the California Court, by choosing to recognize by comity the void Ohio decree, was incapable of curing its defects or of giving it any greater validity than it enjoyed at the time it was entered; therefore, the Order of the California Court (R.Vol.VI, 182) was without substance and amounted to a nullity which could not command adherence from the Florida Court under the Full Faith and Credit Clause of the Federal Constitution or under the doctrine of comity.

While it is true that a Florida Court has apparently not ruled directly on the specific point, the Supreme Court of Alabama clearly expressed the law involved on this point in the case of **Mobile County v. Williams** (Ala. 1913) 180 Ala.639, 61 So.963, 965, when it stated:

> "A **void** thing is a no thing. It has **no** legal effect whatsoever and no rights whatever can be obtained **under it or grow out of it.** In the law it is the same thing as if the **void** thing had never existed." (emphasis supplied)

(c) That irrespective of the validity or invalidity of the Ohio decree (R.Vol.VI, 87, PX 2, PA 10-12) and the effect thereon of the ruling of the California Court (R.Vol.VI, 182), the Florida Courts have consistently held that in custody cases the question of the welfare of the

child is of paramount importance and that it is the duty of the Court to determine for itself what would be for the best interests and welfare of children within its jurisdiction and in the custody of which parent their interests would best be served.

The Florida Supreme Court, in deciding the case of **Di Giorgio v. Di Giorgio** (1943 Fla.) 153 Fla.24, 13 So.2d 596, 597, involving circumstances similar to those in the case at bar, said:

> "The law is and has been from time immemorial that each state is not only empowered but is charged with the duty to regulate the custody of minors within its borders."

In **Neal v. State** (1961 Fla.App.) 135 So.2d 891, 895, the Florida Court said:

> "The public policy of Florida, as reflected by the rulings of our Supreme Court, impels the view that in custody proceedings a decree of a foreign jurisdiction involving that issue shall give way to a decree based upon the best interests of the minors involved."

To the same effect, see also **Rhodes v. Bohn** (1959 Fla.App.) 135 So.2d 891, Aff. 121 So.2d 779; **Tom v. State** (1963 Fla.App.) 153 So.2d 334; **Avery v. Heermance** (1962 Fla.App.) 138 So.2d 775.

The Respondent has no argument with the position taken by the Petitioner that in most states, including Ohio and Florida, the governing factor in custody cases

is the welfare of the child. However, throughout the proceedings below, the Petitioner has consistently maintained that it was incumbent upon the Respondent, in order to obtain custody of the children here involved, to show such a change of circumstances, relating to the Petitioner subsequent to the Ohio Decree of October 8, 1960 (R.Vol.VI 87, PX 2), as to warrant a change of their custody to her.

Assuming, without admitting, that a change of circumstances must be shown in such cases, it is the position of the Respondent, as it has been throughout the proceedings below, that the burden of proving such changed circumstances has at all times rested upon the Petitioner; this for the reason that prior to the proceedings below, where the issue of custody was litigated for the first time in a truly adversary manner, the only valid decree in existence affecting the custody of the children was the original Ohio Decree of Divorce of May 18, 1960 (R.Vol. VI 85, PX 1, RX A), which granted custody to Respondent. The Order of the Ohio Court of October 8, 1962 (R.VI 87, PX 2), besides being void on its face, was entered without a showing of any changed circumstances warranting a change of custody to the Petitioner.

Ohio law requires a showing of changed circumstances before custody of minor children will be changed from one parent to another, as it was pointed out in **Bastian v. Bastian** (1959 Ohio) 160 NE 2d 133, 136, 73 ALR 2d 1440, 1443:

> "The pole star in all custody matters between parents is, what is for the best interests of the child whose custody it is sought to change, sub-

> ject, however, to the rule that where a court has once decreed that a home with one of the parents is fit and proper, no subsequent change of custody should be made, unless there has intervened such changed conditions affecting the welfare of the child that a change of custody is required to promote the best interests of that child."

It is apparent that the order of October 8, 1960, (R.Vol.VI 87, PX 2) is directly contrary to such requirements of the Ohio law as pointed out in the Bastian case, supra, relied upon by Petitioner (P 20).

While it is true that the Ohio decree of October 8, 1960, (R.Vol.VI 87, PX 2) does refer to "changed conditions and circumstances since the date of the previous order", it is obvious that such "changed conditions and circumstances" referred to actually concern solely the fact that Respondent had left the State of Ohio with the two minor children contrary to the provisions of the Final Decree of Divorce (R.Vol.VI 85, PX 1, RX A). As it was pointed out in **Di Giorgio v. Di Giorgio**, supra, citing and following People ex rel **Wagner v. Torrence**, 94 Colo.47, 27 P.2d 1039, 1039:

> "The court fixed a new status for the children, not on any showing that their welfare required a change of custody, but as a part of the punishment of respondent for contempt and to maintain the authority of the court whose order had been violated. Is the interest and welfare of the children to be thus determined and possibly jeopardized on account of parental indifference to an Order prohibiting removal from the State?

> We think not . . . Violation of the removal order did not of itself defeat her custody. It subjected her to punishment for contempt. When she became domiciled in Colorado, it became the domicile of the children."

For the foregoing reasons, and based upon the authorities above quoted, it is respectfully submitted that there is no Federal question properly to be considered by this Court. In language so eloquently expressed by the Honorable Mr. Justice Frankfurter, in his concurring opinion, in **May v. Anderson** (1953) 35 US 528, 97 L Ed 1221, 1228, 73 S Ct 840, it was said:

> "Interests of a State other than its duty towards children may also prevail over the interest of National unity that underlies the Full Faith and Credit Clause. But the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time."

In his dissenting opinion in **Kovacks v. Brewer** (1958) 356 US 604, 2 L Ed 2d 1008, 1014, 78 S Ct 963, Mr. Justice Frankfurter again stated, with respect to the extra-territorial effect of custody decrees:

> "Because the child's welfare is the controlling guide in a custody determination, a custody decree is of an essentially transitory nature.
>
> • • •

"... a court that is called upon to determine to whom and under what circumstances custody of an infant will be granted cannot, if it is to perform its function responsibly, be bound by a prior decree of another court, irrespective of whether 'changes in circumstances' are objectively provable.

* * *

"In short, both the underlying purpose of the Full Faith and Credit Clause and the nature of the decrees militate strongly against a constitutionally enforced requirement of respect for foreign custody decrees."

## CONCLUSION

It is respectfully submitted that, in the proceedings below, no title, right, privilege or immunity of the Petitioner has been denied, abridged or drawn in question so as to invoke the jurisdiction of this Court under 28 U.S.C. Section 1257 (3) and that, inasmuch as the Petitioner has not been improperly denied the benefit of the Full Faith and Credit Clause of the United States Constitution or the provisions of the doctrine of comity, his Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EVERETT H. DUDLEY, JR.
Attorney for Respondent
296 East 3rd Avenue
Hialeah, Florida

# SUPPLEMENTAL APPENDIX

STATE OF FLORIDA, ex rel., NORBERT FOX, individually, and as next friend and legal custodian of DEBORAH ANN FOX and DENISE MARIE FOX, his two minor children,

Petitioner,

-vs-

FLORENCE J. WEBSTER, formerly known as FLORENCE J. FOX,

Respondent.

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## SUPPLEMENTAL APPENDIX TO BRIEF FOR RESPONDENT IN OPPOSITION

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The Respondent is reluctant to permit the facts as related by the Petitioner to stand uncorrected but is perplexed as to how to reply to the same and at the same time stay within all pertinent rule requirements which, in the interpretation of Respondent do not permit such remarks to be contained in the body of the brief. Accordingly, the Respondent begs the indulgence of this Court and, as an addendum and appendix to the foregoing Brief in Opposition to Petition for Writ of Certiorari sets forth below pages 16 through 24, inclusive, of the Brief of Respondent in Opposition to Petition for Writ of Certiorari heretofore filed in the Supreme Court of Florida for the reason that they adequately represent the corrections which Respondent would make to the distorted version of the facts related by the Petitioner. References to Record and pages correspond with the Record filed in the Supreme Court of Florida.

## PROTEST AS TO PETITIONER'S STATEMENT OF FACTS

The facts of this case, which have been argued at length both in the Trial Court and in the briefs and oral argument before the District Court of Appeal, are again reargued by the Petitioner in his Petition for Writ of Certiorari and accompanying brief.

The facts, as related by the Petitioner are, as they were in his former brief and in his oral argument, grossly inaccurate, replete with half-truths and constitute an apparent, if not deliberate, attempt to distort the record, which fortunately speaks for itself, and to tailor it to suit his own ends.

Without attempting to burden this Court with another prolonged dissertation of the facts, the Respondent, in order to protect herself from all eventualities, reluctantly feels impelled to point out to this Court, as evidence of the Petitioner's lack of candor, the following:

THE RECORD CLEARLY SHOWS—

1. Contrary to the impression which the Petitioner would create, the Respondent and her present husband are exceptionally good parents; they provide the children with a happy home, immaculately clean, with good neighbors (R 126-129) (SA 10). They are a well integrated family and the Respondent and her husband show a great deal of interest in the children. Deborah Ann attends school regularly, is generally an average student and receives a great deal of help at home from the Respondent

and her husband (R 236-237)(SA 13). She is emotionally well adjusted and is well liked by the children at school.

Both children attend the Catholic Church regularly (R 114)(SA 15) and the wife uses her best efforts to raise them in the Faith (RX B)(SA 16), sometimes with considerable personal hardship to herself (R 187-188)(SA 16). The wife makes most of the children's clothes herself (R 113)(SA 15). Both children are in good health and lack for nothing reasonably necessary for their happiness and well being (R 129)(SA 12).

2. The Petitioner relates that the Respondent, prior to her divorce from him, engaged in certain extra-marital relations with her present husband. While this is not denied by the Respondent, it does not appear that the said extra-marital relations were of a continuing nature for which she should forever be condemned. (See page 13 of this brief)

"In **Kenimer v. Senter,** supra, under like circumstances, in which the Supreme Court of Florida denied certiorari, the Circuit Court of Dade County, speaking through Judge Charles A. Carroll, said:

> 'Even if the parties had had an affair as charged by the plaintiff, that of itself would not disqualify the defendant to have custody of the child. It often happens that a woman married to one man becomes attracted to another. It is not unusual that where such woman has grounds for divorce a divorce is obtained and the parties so attracted to each other marry. Human nature being what it is, these things happen. It would

be a strange rule that would cause such an event to disqualify such a person to have custody of his or her children.'

"In **Carson, Florida Law of the Family, Marriage and Divorce**, Chapter 61, Sec. 5, P.728, the author states:

'The marital misconduct of one of the parents does not bar the right of custody. Thus custody may be properly awarded to a mother though the divorce be given to the father where it is not shown she is morally unfit to have custody. The fact the mother may have been divorced for adultery does not ipso facto militate against her right of custody. The circumstances of each such case must be investigated and the courts discretion in the matter is a wide one, not necessarily based on punishment or reward of the litigants.'"

3. The Petitioner asserts that the Respondent traveled across the continent with a certain Jim Whitely, of whom she had a picture suitable for framing, and that they planned to spend the night at the home of his cousin (P 5, PB 4). However, the Petitioner does not mention that the trip was made by air; that they were accompanied by their children, one of whom was very ill, and that they did not spend the night in New York (R 169) (SA 17).

4. The Petitioner points out that at the time she entered the separation agreement, wherein she was to have custody of the children, the Respondent knew her present husband was to be assigned to Los Angeles and

that she did not intend to keep her part of the agreement vital to Petitioner (P 6, PB 6). However, the Petitioner does not mention that, at the time of her marriage to her present husband, Mr. Webster's application for transfer back to Cleveland had been in for months and that they anticipated living in Ohio (R 76-77)(SA 18).

5. The Petitioner charges that the wife removed the children from the State of Ohio and went to California on August 4, 1960, contrary to the advice of her Ohio attorney (P 6, PB 6). However, the Petitioner fails to state that the Respondent had never met her Ohio attorney, that he had refused to see her, and that she acted upon the advice of her California attorney in whom she had confidence (R 154-155, R 175-176)(SA 18).

6. The Petitioner asserts that while in California the Respondent worked in a bar and restaurant and that she and her husband worked opposite shifts so that they would not have to pay a baby sitter (P 7, PB 7). The record shows that the establishment where she was employed enjoyed a very good reputation (R 86)(SA 21); that she would not have worked if it had been necessary for her to have the children cared for by strangers and that the purpose of her working was simply to provide for some of the extra luxuries and material things which they might not otherwise have had (R 178-180)(SA 22).

7. The Petitioner states that the Respondent admits signing the United States postal receipt for the report of the Department of Domestic Relations on the 26th of September, 1960, (P 7, PB 7, PX 4)(R 156)(SA 23). In this the Petitioner is patently inaccurate. The Respondent admits signing a United States postal receipt on the date

stated, however, the record does not show that it is the same postal receipt as the Petitioner asserts accompanied the report of the Department of Domestic Relations. The number was conveniently missing from the postal receipt photostated and submitted in evidence by the Petitioner at the trial (PX 4). The Respondent emphatically denied ever receiving the report of the Department of Domestic Relations (R 267-268) (SA 24).

It is significant, however, that the report of the Department of Domestic Relations recommending that custody of the children be changed to the Petitioner (PX 4) contains no information about the Respondent, and that, in spite of such recommendations, the Ohio Court did not find that the Respondent was not a fit person to have custody of the children.

The Petitioner makes great point in his brief (PB 10) that the California Court later granted the Petitioner a Writ of Habeas Corpus on the basis of the alleged validity of the Ohio Order, which he purports granted him custody. He avoids mentioning, however, that in conjunction with its ruling, the same California Court said:

> "I find in this case that both parties would be, if I had the matter of custody in de novo, that I would find both parties are fit and proper parties to have the custody of these children."

(See also (R 167-168) (SA 24) Statement by Mr. Louis)

8. The Petitioner asserts that the Respondent admitted issuing at least one bad check on her account without sufficient funds (R 94, P 9, PB 11). However, the

record shows that there was no wrongful intent on the part of the Respondent and that she fully believed that there were sufficient funds in her account to cover the check (R 94)(SA 25).

9. The Petitioner charges that the wife admits knowing the police were looking for them (P 9, PB 11, R 94). However, it is clear on the record, and conveniently overlooked by the Petitioner, that the police referred to were personal friends of the Respondent and her present husband and that their inquiries were made out of friendly interest (R 94-95)(SA 25).

10. It is asserted by the Petitioner (P 9, PB 11) that the Respondent and her present husband drove from Los Angeles to Miami in a truck and camper, which had not been fully paid for, and abandoned them at the Miami Airport. The record clearly shows that they did not intend to violate the law in this regard, assuming, without admitting, that they did so, and that they took affirmative steps to see that the property was properly cared for and returned (R 189-190)(SA 26).

11. The Petitioner states that Deborah Ann was uprooted from school and did not attend school during the four months she was in Puerto Rico (R 96, P 9, PB 11). He does not mention, however, that during that time, according to the record, Deborah was tutored daily at home by the Respondent who received the necessary books and supplies from the Parochial School (R 96-97)(SA 26). It further appears from the record that since their return to Florida, the Respondent has used her best efforts to enroll the child in a Parochial school, in accordance with her agreement with the Petitioner, and has failed in

her efforts only because of a lack of classroom space due to the current Cuban situation (R 193)(R 26).

12. Nowhere in the record does it appear that the Respondent and her present husband have not had, or do not have sufficient funds to meet their needs was when they were unable to raise, on a moment's notice, the bondsman's fee, in the amount of $500 in compliance with the Order of the Trial Court (R 10-11). It is significant, however, that they had acquaintances with sufficient confidence in their character and integrity to lend them their entire savings for that purpose (R 316)(SA 28).

13. The Petitioner would have the Court believe that the Respondent and her husband are renting a two-bedroom house, sharing their bedroom with their son and the three girls sharing the other bedroom (P 9, PB 11). Yet it was pointed out in the Respondent's brief and in Oral Argument before the District Court of Appeal that since the hearing before the Trial Court that the Respondent and her present husband have purchased a large home, having three bedrooms and ample living space for their needs in a desirable neighborhood.

14. Petitioner avers (PB 12) that his parents who are in 'perfect health' would watch over the children when he was working, should he be awarded custody. He does, however, neglect to state that the age of his mother is 61 and his father is 67 (R 199)(SA 29).

15. The Petitioner states (P 10, PB 12) that when he first saw Deborah Ann in Florida, she ran up, hugged and kissed him (R 201)(SA 7) but since the proceedings she hides and refuses to give him a kiss. However, the

Petitioner again conveniently avoids mentioning that at the first time he saw Deborah, according to his own testimony on record, he did not inform her that he intended to take her away from her mother and that it has only been since this fact has become known to her that her attitude toward him has cooled (R 227-228) (SA 29).

16. The Petitioner, throughout his brief, implies that his driving desire is to provide for the best interests and welfare of his children.

However, since the rendition of the Ohio Order, which he alleges awarded him custody of the children (PX 4) the record shows that he has contributed nothing toward their support (R 224-225) (SA 30); instead, he has imposed this obligation upon the Respondent and her present husband. The fact that Mr. Webster has fulfilled this duty is beside the point.

## PROOF OF SERVICE

I, Everett H. Dudley, Jr., attorney for Florence J. Webster, formerly known as Florence J. Fox, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of June, 1964, I served a copy of the foregoing brief and appendix on Norbert Fox, petitioner, by mailing a copy in duly addressed envelope, with first class postage prepaid, to his attorney of record, as follows:

To: Paul A. Louis, Esq., Attorney for Petitioner
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